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Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 182.

DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

LAWRENCE E. GANNON.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Brief for the Plaintiff.—A. G. Riddle, Attorney D. C.

JUDD & DETWEILER, PRINTERS.

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THE CASE.

In the court below Gannon sued the District for negligence, setting out his cause of action thus:

Yet, nevertheless, the plaintiff alleges that on or about the twenty-third day of April, 1881, and a long time previous thereto, the defendant wrongly and unjustly allowed and permitted three certain projections, commonly called and known as "man-traps," to be and remain in and upon the said highway, the said man-traps projecting several inches above the surface of the said street or avenue; by means of which said negligence of the defendant in this respect the

hind wheel of the carriage of the plaintiff, with the plaintiff therein, was caught beneath one of the said projections, whereby the axle of the said carriage was broken; the same was overturned and greatly damaged, the plaintiff was violently thrown therefrom and dragged a long distance along the surface of said street.

Declaration, p. 1.

The issue taken was tried by a jury and resulted in a verdict and judgment for plaintiff below for $5,000 damages (p. 4).

On a case made, and exceptions, the court in general term affirmed the judgment, and the case is here on this record at the instance of the District (p. 25).

Among the matters passed upon by the general term was the District's motion in arrest of judgment, to wit, that the declaration averred no notice to the District of the alleged defect in the street named (p. 4).

It overruled the second exception taken, because the circuit court refused to submit the question of contributory negligence to the jury (p. 21).

It overruled 3d, 4th, 5th, and 6th exceptions (pp. 22 and 23), which raise the main questions in the case, to wit, the District of Columbia, its people and their property, were not liable to actions for damages for the exercise of authority under the acts of Congress by the United States Commissioners governing said District.

ASSIGNMENT OF ERRORS.

The plaintiff in error says that said court erred in overruling said motion in arrest.

In overruling said second exception.

In not sustaining each of said exceptions 3d, 4th, 5th, and 6th.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

The defendant moved the court to dismiss said case in error under the first section of the act of March 3d, 1885, 23d Stats., 443.

The sole immediate governing power of the people of the District is exercised by three Commissioners. Their offices are created by act of Congress; their appointment is by the President, subject to approval by the Senate. They derive no right or power from the people of the District, and are in no legal way responsible to them, nor can the people be liable for them, except as provided for and pursuant to an act of Congress. There is no such act imposing liability upon the District and its people for their acts or omissions, as ruled by the court below in this case. The authority conferred upon said Commissioners by the statutes of Congress to do and perform the acts and omissions counted upon, without liability on the part of the people therefor in damages, is denied by the defendant in error in this case, so that the extent, nature, and quality of this authority are directly in issue. The validity of the authority, as the District defines and exercises it, is drawn in question, as we submit, under the second section of said act.

I return to the record.

First. THE MOTION IN ARREST.

A casual examination of the declaration shows the utter absence of any averment that the District had notice of the alleged bad condition of the street, the cause and scene of the accident. There is no attempt to state such notice; no words used for any purpose that suggests the idea of notice *arguendo*. It was entirely absent from the mind of the pleader when the declaration was drawn.

The plaint does not show the case of a good title to recover, defectively stated, which a verdict may cure. It shows no title. Without proof of notice he cannot recover; without averment of notice he cannot prove it, is the ruling

of the law on this matter. A plaintiff is presumed to prove his averment and no more.

Of the numerous authorities decisive of this motion we here cite the following, may offer more on the hearing:

Gould's Pleading, chap. 10, several sections, with notes, pp. 459–470, ed. of 1861; see specially secs. 20, 22, 23, 24. 25.

Stephens' Pleading, beginning at p. 147, notes, &c.

Third Blackstone's Com., p. 3935.

Rushton vs. *Aspinall*, Doug., 683, Ld. Mansfield; the case where no title to recover is shown in the pleading.

2 Burrows, 1159; case of a good title defectively stated and may be cured.

Stilson vs. *Prince*, 2d Mass., 520; case of no title.

Second. THE OVERRULING OF THE SECOND EXCEPTION.

The prayer, for disallowance of which the exception was taken, is as follows:

> "That if from all the proved conditions and circumstances attending the accident complained of it shall appear as probable to the jury that the axle-tree of the plaintiff's carriage was defective, and that defect contributed to the accident, he cannot recover in this case."

This was refused upon the strange ground that there was no evidence upon which the question of fact could be raised.

Here was the exact condition of the street, a diagram with measurement of the obstruction, the rate of speed, the smaller fore wheel striking and passing over the obstruction, the touch of the hind wheel and the snapping of its axle, everything that could be in the case save proof of the axle by an expert, and the plaintiff *swore he had sold the buggy.* It was for him to prove that the axle was sound and of good material. Surely here was enough to go to the jury on this important point.

Third. THE LIABILITY OF THE DISTRICT FOR THE ALLEGED INJURY.

It will be conceded that no act of Congress makes the District liable to suit for personal injury, as in the case under consideration.

Nor will it be contended that the streets and avenues of the city are a source of revenue to the District, within the meaning of the cases bearing upon this point.

The liability, if it exists, must be referable to a rule obviously arising from the status of the District, its people and their property, in relation the cause of action.

The case of *Wightman* vs. *Washington City* (1 Black, 39) deals with the question of municipal liability in an elementary way, and, so far as I know, has been followed in the Supreme Court, and on the ground there laid down, in the cases in that Court since. The conclusion there reached and the reason for it have never been shaken.

That was a suit to recover for a personal injury caused by the falling of a bridge over Rock creek. The duty to keep this in repair was specifically imposed on the corporation, by its charter—an act of Congress.

The question of ultimate legal liability was considered with care. Upon this point the court said:

> "Whether the action in this case is maintainable against the defendant or not depends upon the terms and conditions of the charter, as is obvious from views already advanced. Which were: 'When it appears from the several provisions of the charter that the burden was imposed *in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control*, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter.'"

The court speaking of the defendant corporation really speaks of the corporators as "they" and "them," for they use their powers and exercise their franchises.

It goes on:

> "In view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants *in consideration of the privileges and immunities conferred by the charter.* Most ample means, also, are placed at the disposal of the defendants or within their control to enable them to perform the duty enjoined.
>
> "On this one point it would seem there can be none (no doubt), as the defendants have very large powers to levy and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages, and they derive means for granting licenses," &c.

Thus, then, the duty to the corporation flows from the available use of powers and franchises, enabling it to perform its duties and command means to respond in damages.

This remains the judicial rule of the District—the law of this case. It derives the liability to suit directly and wholly from privileges and powers conferred upon the corporation. Necessarily when these franchises and powers cease liability departs with them.

It is known to the Court that after the civil organizations of the District, and till the act of February 21, 1871 (16 Stats., 419, and Rev. Stats. D. C., p. 2), took effect, there were three municipalities within the territory on the northerly side of the Potomac; that these were merged in the District as a municipal government by the above statute. It may be borne in mind that these municipalities are unlike any known municipalities, in this, the inhabitants of the District can exercise no franchise of American citizenship, except as members of a municipal corporation. The municipality created by the act of February 21, 1871, was in effect abolished by the act of June 20, 1874 (18 Stats., 116), which created the commissional government. Congress was so well pleased with this its temporary expedient that by act of June 11, 1878, it made that government permanent. (Supplement to Rev. Stats., 339.)

This but makes permanent the abolition of the real municipality. Whoever examines the act will see that the new government is a device whereby the United States, exercising its own immediate authority, governs the people of the District in its own interest without any right of interference on the part of the people whatever. Congress can alone legislate for the District. The President appoints its executive, and this or these appoint all the subordinates. Congress levies all taxes upon the property. When collected they are paid into its treasury, paid out by its appropriation, and all District disbursements are accounted for to its controller. The District is as much a subdepartment of the United States Government as any agency in its civil service, and in all its suits the United States is the real party in interest.

It is true that the statute perpetuating this state of things ironically declares: "The District of Columbia shall *remain* and *continue* a municipal corporation, as provided in section 2 of the Revised Statutes relating to said District." When it is remembered that there are no corporators, no council, no corporate officers, franchises, nothing but unrequited burdens, it is realized that this is the purest legal fiction ever perpetrated by an inventive legislative body.

What can be said of this liability on the part of a people who have no rights, powers, or franchises as a consideration? Had this people surrendered their corporate powers and franchises and elected to take the present government some show might be made possibly that the contributions of Congress, its government and legislation, took the place of their own thus given up, and so this old liability continues. There is no foundation for this, nor is there any foundation for holding the commissional government responsible for this class of cases. They exercise a share of constituted power, for public purposes, in the same way as do the commissioners and supervisors of counties, the trustees of townships, out of which no causes of action can arise.

In the case of *Clark* vs. *The District* (3d MacArthur, 79)

the supreme court of the District passed adversely upon this proposition, regarding it as within the *Barnes case* (91 U. S., 540), not distinguishing between the changed conditions of the District when the cases arose.

A change in the law of the jurisdiction of this Court prevented a review of the Clark case, nor has the court below since permitted a reargument of this question, steadily adhering to the Clark case.

When the Barnes case arose the District was in full possession of the large municipal powers conferred by the act of February 21, 1887, cited above, and hence was within the broad reach of the Wightman case, before quoted.

The main proposition of the Barnes case was that the District was not responsible for the acts of the Board of Public Works, created by the 37th section of the act of February, 1871, on the ground that that body was an independent power, not a District agency. Indeed, the general question of liability of a municipal corporation for its own acts was hardly before the court in the case. It certainly does not nor does any case impair or add to the Wightman case.

To regather and attempt a review of the wide field of the American and English cases bearing upon this question would be a useless labor.

The case of *Hill* vs. *The City of Boston* (122 Mass., 344) has done this, down to 1877, in a manner to render all inferior work gratuitous. The immediate occasion was the difference between the rulings upon the question of municipal liability to suit for damages, as in this case, between the Supreme Courts of the United States and of Massachusetts, a decision which lays all examiners of the question in its many aspects under the deepest obligation to that court. It is a repository of the cases admirably stated and arranged, and its conclusions satisfactory to those at liberty to accept them. Differing as do the cases of Wightman and Hill, they concur in exonerating the District from liability in this case, as I submit.

Fourth. ANOTHER VIEW IS SUGGESTED.

The agency employed by Congress for the government of the District, though called a municipal corporation, under the case of Barnes above, as under the two leading cases just referred to, as well as a multitude of other authorities, may be said to be of the nature of counties and townships of the various States, and can no more incur liability for the cause of action under consideration, than can those *quasi* corporations.

Respectfully submitted,

A. G. RIDDLE.

IN THE

Supreme Court of the United States.

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LAWRENCE E. GANNON.

Supplemental Brief for the Plaintiff in Error on the Liability of the District for Personal Injuries Occasioned by Defects in the Public Streets.

HENRY E. DAVIS,
For the Plaintiff in Error.

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I.

THE GENERAL RULE OF LIABILITY OF MUNICIPAL CORPORATIONS FOR DEFECTIVE STREETS, ETC.

Dillon (Mun. Corp., 3d ed., sec. 1017) thus summarizes the law as to the liability of municipal corporations growing out of defective streets, &c.:

"In the absence of an express statute imposing the duty and declaring the liability, municipal corporations proper, having the powers ordinarily conferred upon them respecting bridges, streets and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil

action for special injuries resulting from neglect to perform this duty. Such duty and liability are considered to exist, without a positive statute, when the following conditions concur:

"1. The *place* in question, whether bridge, sidewalk or street, must be one which it is the duty of the corporation to repair or keep in a safe condition; and this duty (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation.

"2. This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or to rest upon the *municipal corporation, as such,* and not upon it as an agency of the State, or upon its officers as independent public officers. (This, however, in general, appears sufficiently where the municipality sought to be made liable exists under a special charter or general act which confers upon *it* peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the State at large under its general enactments concerning ways.)

"3. The *power to perform* the duty of maintaining the streets in a safe condition, by authority *to levy taxes or impose local assessments for the purpose,* must be (as it almost always is) conferred upon the corporation."

The foundation of the liability is thus stated by this Court:

"Where a specific and clearly defined duty . . . of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed *in consideration of the privileges granted and accepted,* and the means to perform the duty are placed *at the disposal of the corporation,* or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter."

Then, passing to the case under consideration, the Court adds:

"Whether the action in this case is maintainable against the defendants or not depends upon the terms and conditions of their charter, as is obvious from the views already

advanced. . . . It is obvious that the duty enjoined is as specific and complete as our language can make it; and it is equally clear that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants *in consideration* of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants, or within their control, to enable them to perform the duty enjoined. . . . All the conditions of liability, therefore, as previously explained, concur in this case."

Weightman *vs.* Washington, 1 Bl., 50–'1.

See Nebraska City *vs.* Campbell, 2 Bl., 590.

And in the subsequent case of Barnes *vs.* District of Columbia, 91 U. S., 540, the character of the corporation's charter as being *voluntary* is made prominent as a condition of liability.

The question, which had already frequently been before that court, was considered by the supreme court of Massachusetts in 1877 in a case—*Hill* vs. *Boston*, 122 Mass., 344—in which the authorities were reviewed at length and distinguished with great care in an elaborate opinion by Mr. Justice Gray, then chief justice of that court. Among others, the cases of *Weightman* vs. *Washington*, *Nebraska City* vs. *Campbell* and *Barnes* vs. *District of Columbia* were subjected to critical examination; and the opinion, although not so stating it in terms, quite convincingly shows that, whatever other conditions of liability may be deemed necessary, the adjudged cases holding municipal corporations liable in such actions have all involved one of three features, viz:

1. That the work out of which the injury arose was such as ordinarily appertained to private enterprise, and was carried on by the municipal corporation just as an individual or private corporation might have carried it on, *e. g.*,

the construction and maintenance of docks, canals, &c., for use of which by individuals tolls were or might have been exacted.

2. That the negligently performed duty was one clearly imposed upon the corporation and was so imposed in consideration of benefits or privileges received.

3. That the charter of the municipal corporation under which the duty arose was voluntary, as to the corporation, and was accepted by it.

The opinion concludes:

"But, however it may be where the duty in question is imposed by the charter itself, the examination of the authorities confirms us in the conclusion that a duty, which is imposed upon an incorporated city, not by the terms of its charter, nor for the profit of the corporation pecuniarily or otherwise, but upon the city as the representative and agent of the public, and for the public benefit, and by a general law applicable to all cities and towns in the Commonwealth, and a breach of which in the case of a town would give no right of private action, is a duty owing to the public alone, and a breach thereof by a city, as by a town, is to be redressed by prosecution in behalf of the public, and will not support an action by an individual, even if he sustains special damage thereby."

Hill *vs.* Boston, 122 Mass., p. 380.

II.

THE CHARACTER OF THE SO-CALLED MUNICIPAL CORPORATION, THE DISTRICT OF COLUMBIA.

Prior to the creation of the municipal corporation, The District of Columbia, there were in the District three corporations for municipal purposes, viz: Georgetown, incorporated by Maryland by act of 1789, chap. 23; the Levy Court, created by act of Congress of March 3, 1801 (sec. 4,

2 Stat., 115); and Washington, incorporated by Congress by act of May 3, 1802 (2 Stat., 195). Many subsequent acts relating to the general powers of these corporations were passed from time to time, of which the most important are as follows:

Georgetown: Acts of Maryland, 1797, chap. 56, 1799, chap. 85; Acts of Congress, March 3, 1805 (2 Stat., 332) March 3, 1809 (Do., 537).

Levy Court: Acts of Congress, July 1, 1812 (2 Stat., 771), May 3, 1862 (12 Stat., 383), March 3, 1863) (Do., 799).

Washington: May 15, 1820 (3 Stat., 583), May 26, 1824, (4 Stat., 75), May 20, 1826 (4 Stat., 186), May 17, 1848 (9 Stat., 223).

The municipal corporation, The District of Columbia, was created by act of Congress of February 21, 1871 (16 Stat., 419), and continued, with provisions for a temporary government of the District, by act of June 20, 1874 (18 Stat., 116). The existing permanent government was provided by act of June 11, 1878. (20 Stat., 102.)

The late corporation of Washington, under the acts above cited, had certain duties imposed upon it in consideration of certain privileges granted, and the means to perform those duties were within the control of the corporation; whereby it was rendered liable for negligence in the performance such duties.

Weightman *vs.* Washington, 1 Bl., 39.

And under its first form of government the District of Columbia was similarly situated and, as holding a *voluntary* charter, was similarly liable.

Barnes *vs.* Dist. Col., 91 U. S., 540.

But this form of government of the District wholly disappeared in 1874. By the above-cited act of June 20 of that

year it was provided as to the government substantially as follows:

(1.) The former government was abolished. (Sec. 1).

(2.) A Commission was created, to consist of three persons appointed by the President, with authority to exercise the former powers of the Governor and Board of Public Works under the earlier act, subject to certain limitations, and with "power to apply the taxes and other revenues of said District to the payment of the current expenses thereof, to the support of the public schools, the fire department and the police," and to the payment of certain debts of the District; but the Commission was forbidden to make any contracts or incur any obligations except such as might be necessary to the faithful administration of valid laws, the execution of existing legal obligations and contracts and the protection and preservation of improvements existing or commenced at the time of the passage of the act. (Sec. 2.)

(3.) An officer of the Engineer Corps of the Army was provided to be detailed to discharge the duties formerly devolved upon the chief engineer of the Board of Public Works (Sec. 3.)

(4.) A tax for the support of the government was levied and its collection provided for. (Sec. 4.)

(5.) A joint select committee was provided for to prepare a frame of government for the District. (Sec. 5.)

(6.) And other provisions were made not material to the question under consideration. (Sec. 6–10.)

The powers of the Governor and Board of Public Works, to which this Commission succeeded, did not in any respect involve the levying of any tax, or the application of any Dis-

trict funds to any purpose except in pursuance of appropriations previously made by law. (16 Stat., 419.)

By the act of June 11, 1878, creating the existing government of the District, it is provided, as affects the question now under consideration, as follows:

(1.) The District continues a municipal corporation, and the Commissioners provided for by the act are to be deemed and taken as officers of such corporation. (Sec. 1.)

(2.) The Commissioners consist of two civilians and an officer of the Engineer Corps of the Army, respectively appointed and detailed by the President; and they have the powers (except as limited in the act) and are subject to the duties, restrictions and limitations of the Commissioners under the act of 1874. (Sec. 2.)

(3.) The Commissioners are the successors of the earlier board and they have power, *subject to the limitations of the act*, "to apply the taxes or other revenues of said District to the payment of the current expenses thereof, to the support of the public schools, the fire department, and the police;" but they may make no contract or *incur no obligation* other than such as are provided for in the act and *shall be approved by Congress.* They are required annually to submit to the Secretary of the Treasury, "for his examination and approval, a statement showing in detail the work proposed to be undertaken by them during the fiscal year next ensuing and the estimated cost thereof;" also the cost of constructing, repairing and maintaining bridges and of maintaining public institutions of charity, reformatories and prisons, and the expenses of the Washington Aqueduct and its appurtenances; "and also an itemized statement and estimate of the amount necessary to defray the expenses of the Government of the District of Columbia for the next fiscal year." The Secretary of the Treasury, having considered the said estimates, sub-

mits his statement with the original estimates to Congress; and to the extent to which Congress approves the estimates it appropriates the amount of one-half thereof, and the remaining half "*of such approved estimates*" is levied and assessed upon taxable property and privileges in the District and collected according to law (sec. 3). The law governing the levy and collection of taxes is the act of March 3, 1877 (19 Stat., 396), which, being earlier in date than the act we are considering, is in some respects (*e. g.*, the provisions of sec. 2) superseded by the later act. But to make double sure the assurance of depriving the Commissioners of all freedom of action, Congress specifically repealed this second section March 3, 1879. (20 Stat., 410.)

(4.) The Commissioners may, by general regulations consistent with the tax act just mentioned, or with other existing laws (of which there are none on the subject), "prescribe the *time or times* for the payment of all taxes and the duties of assessors and collectors in relation thereto." All taxes collected are paid into the Treasury of the United States and the same, as well as the appropriations made by Congress for its one-half as above provided, are disbursed on itemized vouchers, audited and approved by the auditor of the District and certified by the Commissioners or a majority of them; and all accounts of the Commissioners and the tax collectors and all other officers required to account are settled and adjusted by the accounting officers of the Treasury of the United States. (Sec. 4.)

By subsequent enactment in the several annual appropriation acts for the District from March 3, 1879, to July 1, 1882 (20 Stat., 410, 21 Stat., 162, 466, 22 Stat., 144), at which latter date the provision was made permanent, it is provided that all moneys appropriated for the expenses of the government of the District, together with all revenues of the District from taxes or otherwise, shall be deposited in the Treasury of the United States as provided by section

four of the act of June 11, 1878, and (except as to the sinking fund, which is in charge of the Treasurer of the United States as sinking-fund commissioner of the District; sec. 7 of the act of June 11, 1878, 20 Stat., 107) shall be drawn therefrom only on requisition of the Commissioners, specifying the appropriation upon which it is drawn; "and in no case shall such appropriation be exceeded either in requisition or expenditure."

(5.) When any repairs of streets, avenues, alleys or sewers in the District are to be made, or when new pavements are to be substituted in place of those worn out, new ones laid, or new streets opened, sewers built, or any works the total cost of which shall exceed one thousand dollars, such work must be let by contract after due advertising; and one-half of the cost of such work, except that done by street railway companies, is borne by the United States and credited to its contribution to the expenses of the District for the given year. (Sec. 5.)

(6.) The Commissioners annually report their official doings in detail to Congress. (Sec. 12.)

III.

THE DISTRICT'S LIABILITY IN THE LIGHT OF THE ADJUDICATIONS.

1. It is apparent that the District of Columbia is a municipal corporation in name only.

It has no corporators, no franchises, no powers, no rights, and no duties. Whatever powers and duties are involved in the administration of the affairs of the District belong to the Commissioners and are the subject of specific grant to or imposition upon those officers by Congress, which has exclusive jurisdiction in the premises. (Const. U. S., art. I, sec. 8.) The District, as a corporation, is given absolutely

nothing in the way of municipal power. Neither it nor its citizens may participate in the choice of one of its officers; neither it nor they can pass a by-law or ordinance of any kind, such legislative powers as are exercised in the District, except by Congress, being conferred upon the Commissioners *eo nomine: e. g.*, to make building regulations (20 Stat., 131) and police regulations (24 Stat., 368). Not even the Commissioners can raise one dollar in any manner, by tax or otherwise, for any purpose. Not one dollar can be spent by any officer of the District except the Commissioners, and they can make no expenditure except by requisition on the appropriations made on the "approved estimates" which have passed the ordeal of Congress.

It has no charter in the true sense of the word. The act providing the existing Government is the expression of the means adopted by Congress for the exercise of its constitutional authority, and confessedly it speaks the will of Congress to retain full control in the premises.

2. If a municipal corporation in more than name, the District presents none of those features of which some one at least has always been held an essential to liability.

(*a.*) It is charged with no work ordinarily appertaining to private enterprise; no work not distinctively public in its character.

(*b.*) It is the recipient of no benefits or privileges in consideration of which liability can be imputed to it.

(*c.*) It has not a voluntary charter. Even if it had such charter there is much force in what was said by the court in *Hill* vs. *Boston* (122 Mass., p. 380):

"We find it difficult to reconcile the view that the mere acceptance of a municipal charter is to be considered as conferring such a benefit upon the corporation as will render it liable to private action for neglect of the duties thereby

imposed upon it with the doctrine that the purpose of the creation of municipal corporations by the State is to exercise a part of its powers of government— a doctrine universally recognized, and which has nowhere been more strongly asserted than by the Supreme Court of the United States in the opinions delivered by Mr. Justice Hunt in *United States* vs. *Railroad Company*, 17 Wall., 322, 329, and by Mr. Justice Clifford in *Laramie* vs. *Albany*, 92 U. S., 307, 308."

To which may be added the language of this Court in still another case:

"A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but *a department of the State*. The Legislature may give it all the powers such a being is capable of receiving, making it a miniature State within its locality. Again, it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses, or it may itself exercise directly within the locality any or all the powers usually committed to a municipality. We do not regard its acts as sometimes those of an agency of the State and at others those of a municipality, but that, *its character and nature remaining always the same*, it is great or small according as the Legislature shall extend or contract its sphere of action."

Barnes *vs.* Dist. Col., 91 U. S., 544–'5.

But, of course, whether great or small, the liability of a municipal corporation in the respect under consideration depends upon the features we are noticing.

(*d.*) The means to perform the supposed neglected duty are not within the control of the corporation.

(*e.*) Above all things, neither the District nor any of its officers could pay a judgment rendered against it, and there is no possible process whereby such payment could be enforced. A *mandamus* upon the District or the Commission-

ers to levy a tax for the purpose, even if procurable, would be futile, because neither can levy a tax for any purpose. A *mandamus* upon the Commissioners to submit an estimate for such judgment would be impossible, as trenching upon the domain of discretion; but, even if possible, such *mandamus* could not compel the approval of such estimate by either the Secretary of the Treasury or Congress. Such judgment could not be satisfied by levy on the property of the District, for the District has and can have no property which is not a governmental instrumentality and which is, accordingly, not liable to execution. Judgments against the District, no matter for what causes of action, are paid by Congress by appropriation in the usual way, out of the moneys in the Treasury of the United States.

3. A special feature of the District's situation is entitled to great weight in determining the question of its liability.

The streets of the City of Washington are the fee-simple property of the United States; so much so that the United States may sell or otherwise dispose of them. This is the oft-declared law of this Court.

Van Ness *vs.* Washington, 4 Pet., 232.
Potomac Co. *vs.* Upper Potomac Co., 109 U. S., 672.
Edmonds *vs.* B. & P. Co., 114 U. S., 453.

While the late corporation of Washington was given a certain control of these streets, it was also furnished the means and given a consideration for the effective exercise of such control. The same is true of the corporation, the District of Columbia, as originally created.

But as the corporation is now constituted it has nothing to do with the streets, as a corporation. The care of the streets is committed to certain officers who, in that behalf, must be regarded as the agents of the United States only. The limitations under which they rest as to means to enable

them to discharge their duties in the premises have already been pointed out. And it cannot be too often repeated that the corporation is not only not charged with any duty in the premises and has no means to discharge such duty if imposed, but also that it receives from the United States no consideration for any supposed taking on itself the burden, if any such exist, of the care of the latter's property.

HENRY E. DAVIS,
For the Plaintiff in Error.

Office Supreme Court
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MAR 5 1889
JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE DISTRICT OF COLUMBIA
vs.
LAURENCE E. GANNON.
No. 182.

ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF COUNSEL FOR DEFENDANT IN ERROR.

MILANS, LAW PRINTER, 519 7TH STREET, N. W.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE DISTRICT OF COLUMBIA, *Plaintiff in Error*,
vs.
LAWRENCE E. GANNAN. } No. 182.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This was an action brought by the defendant in error in the Supreme Court of the District of Columbia to recover damages for injuries sustained by him by being thrown from his carriage upon the street in the City of Washington and seriously injured. He claimed that the accident was occasioned by the negligence of the District authorities in permitting a stop box to protrude some inches above the surface of Vermont avenue near the middle of the street, upon which he drove in the twilight of the evening, by reason of which one of the axletrees of his carriage was broken, and he was thrown to the ground with great violence, and was permanently injured.

The defendant below plead "not guilty."

The case was tried and a verdict for $5,000 damages was rendered by the jury.

The defendant below, after verdict, filed two motions for a new trial.

The first assigned as grounds the following:

First. That the verdict is contrary to the evidence.

Second. That the evidence adduced at the trial was insufficient to support the verdict.

Third. That the damages awarded by the jury are excessive.

The second is a motion for new trial on bills of exceptions for errors of law committed by the justice in his instructions to the jury.

The defendant below also filed a motion in arrest of judgment, and asssigned for cause:

"That there is no allegation that the District of Columbia had any notice of the cause of the injury complained of in said declaration."

The first motion for new trial and the motion in arrest of judgment were overruled after argument, and judgment entered on the verdict (Rec. p. 4), from which an appeal was taken to the general term. (Rec. 4–5.)

The motion for new trial on exceptions under the rules of the court is for hearing in the general term in the first instance.

The case was heard in the general term upon the appeals, as well as upon the exceptions, and the judgment of the court at special term was affirmed with costs. (Rec. 25.) From this judgment of the general term the case comes into this court by writ of error. (Rec. 25.)

The decision of the general term is final as to the motion for a new trial upon the grounds that—

The verdict is contrary to the evidence.

That the evidence adduced at the trial was insufficient to support the verdict.

That the damages awarded are excessive.

It has been repeatedly held by this court that a judgment on a motion for a new trial is not reviewable here.

Pomeroy's Lessee *vs.* Bank of Indiana, 1 Wall., 592.
Sparrow *vs.* Strong, 3 Wall., 97.
Same *vs.* same, 4 Wall., 584.

ARGUMENT.

Motion in Arrest of Judgment.

Whether the overruling of the motion in arrest of judgment is properly here for revise or not, we will not stop to inquire; but will proceed to consider it. It is covered by the last exception, which is not numbered, but is found at the bottom of p. 24, Rec.

The defendant below moved to arrest the judgment upon the ground:

That there is no allegation that the District of Columbia, had any notice of the cause of the injury complained of in the declaration. In other words, the declaration does not aver that the District had notice that the boxes upon the manholes in the street were projecting, so as to be dangerous.

The declaration does aver:

"That on or about the 23d day of April, and *for a long term prior thereto*, the defendant wrongfully and unjustly allowed and permitted these certain projections," etc.

All the authorities held that notice will be inferred from proof of the existence and continuance of a dangerous obstruction, or defect in a street or sidewalk, sufficiently long to make it probable that the agents of the municipality, must or ought to have known it, the averment of "long continuance" is the equivalent of the averment of *notice*.

2 Dill., Municip. Cops, Sec. 1024, p. 1048.

Chattsworth *vs.* Ward, 10 Ill., 75.

Deepley *vs.* Lowry, 74 Ind., 520.

Dallow *vs.* Albieen, 50 Mich., 129.

Glede *vs.* Mankate, 30 Mich., 256.

The record shows that testimony of the long continuance and notoriety of these dangerous projections in the street was given without objection.

See testimony of Mr. Edward, (p. 11,) to the effect that these boxes had projected several inches above the surface of the street for two years or more.

Mr. Bartlett, another witness, on p. 13, says:

"These two, I think, or three manholes there that had been above the surface for a good while. I often drive up and down Vermont avenue, and I had often noticed them. I could not tell exactly, but I should presume they had been that way six months or a year."

This testimony was in precise harmony with the allagata.

But if there had been no averment of notice or its equivalent in the declaration, the want of it would be cured by verdict.

If the grant of a reversion * * * which lies in grant and can only be conveyed by deed, be pleaded, such grant ought to have alleged to have been made *by deed*, and if not so alleged it will be ground of demurrer; but if the opposite party, instead of demurring, pleads over, and issue be taken on the grant

and the jury finds the grant was made, the verdict cures the imperfection of the pleading, and it cannot be objected to in arrest of judgment or by writ of error.

Stephen's Pleading, 146–'7.
Evan's Practice, 331.

Writs of error do not bring up irregularities previous to trial, they are waived by the trial on the merits.

Evans *vs.* Gee, 11 Pet., at 85.
Marine Bk. *vs.* Fulton Bk., 2 Wall., at 258.

THE EXCEPTIONS.

1. EXCEPTION, pp. 20, 21, record, is to the refusal of the Court to instruct the jury as prayed.

The prayer consists of a preamble and two or three distinct propositions all embraced in one prayer, and refused as a whole.

If any part of it was bad, it was not error to refuse the whole of it, although some part of it standing by itself might properly have been given.

The prayer is as follows:

"If the jury find that with reasonable care the plaintiff could not have avoided the manhole referred to, and that there was no defect in the plaintiff's carriage contributing to the accident, and find the other necessary questions in favor of the plaintiffs, they will then consider what amount of damages he is entited to.

"The jury is instructed that the rule for estimating damages is that of fair compensation for the injury described in the declaration such as any and all persons would be entitled to; that he cannot recover anything for injury arising in part from any peculiar physical organization of his person proved on the trial.

"The rule of care on the part of the defendant as to him and the rule of compensation is the same as to all other persons."

This was intended to be an instruction as to the measure of damages, and also that the plaintiff was not entitled to recover for injuries resulting to him on account of any peculiarity of physical organization.

It will be seen at the bottom of page 23 and on page 24 that the court gave this part of the prayer almost in the language asked, omitting only the preamble to the prayer and a part of the last clause of the prayer in these words: "The rule of care on the part of the defendant."

The Court's instruction is as follows:

"The jury is instructed that the rule for estimating damages in this case is that of fair compensation to the plaintiff for the injury described in the declaration, and that the sum allowed (if the jury should find a verdict for the plaintiff) should only be such as will be allowed to any other person sustaining similar injuries. The plaintiff is not entitled to recover any greater sum because of any injury occurring to him from any peculiar physical organization, if the jury should find such fact was proved at the trial."

The first prayer of the defendant below, page 20, record, related to the care required of the plaintiff below, and was given by the court as asked; and it was certainly not error to refuse to repeat it.

It was as follows:

"That if the plaintiff had full notice of the position and condition of the stop-box referred to, it was his duty to have avoided driving over it; that if in reasonable care he could have avoided it and did not, he cannot recover in this case."

So far as any useful instruction to the jury was concerned, all that was asked in this omnibus prayer covered by the first exception, was given by the court, and it is not error to refuse to charge in the language

prayed, although it may be correct, but the court may formulate the instructions in its own language.

The prayer as asked could not properly have been given because of the preamble, which required the jury to find, as preliminary to estimating the damages.

First, That the plaintiff, with reasonable care, could not have avoided the manhole.

Second, That there was no defect in the plaintiff's carriage contributing to the accident, and,

Third, They were to "find *the other necessary quesiions* in favor of the plaintiff."

The first finding required was probably right enough and the jury had already been instructed, in order to entitle the plaintiff to recover, they must find that he could not, with reasonable care, have avoided the stop-box, so that there was no objection to this save that it was a repetition which the court was not required to give, and having once given it, it was not in error to refuse to repeat it.

The second preliminary finding the court could not have required of the jury, for there was not a syllable of evidence tending to show that there was any defect in the plaintiff's carriage which could have contributed to the accident, and this of itself was sufficient reason for rejecting the prayer as offered.

The third preliminary finding required the jury to "find the other necessary questions in favor of the plaintiff." There is no hint as to what the "other necessary questions" are. They could not, of course, be presumed to know what preliminary facts it was necessary to find, unless they were instructed by the court, and for this reason the prayer as submitted could not properly have been given.

All of the prayer that it was proper to give the court gave in the first prayer asked by the defendant on p.

20, and in the instruction given by the court on p. 32–4, which was the court's modification of the prayer as asked.

SECOND EXCEPTION, on page 21.

"That if from all the proved conditions and circumstances attending the accident complained of it shall appear as probable to the jury that the axletree of the plaintiff's carriage was defective, and the defect contributed to the accident, he cannot recover."

There was not a word of evidence tending to show any defect in the axletree of the plaintiff's carriage, and for this reason the court refused to give it.

The prayer is also obnoxious to the objection that no intimation is given as to what proved conditions and circumstances attending the accident they are to place their conjecture that there might have been a defect in the axletree upon.

Skipping for the present the third, fourth, fifth and sixth exceptions, as they all relate to the liability of the District to be sued and are hereinafter discussed under the head of "jurisdiction," we pass to the

SEVENTH EXCEPTION on p. 23, Rec. It is to the instruction given by the court upon its own motion which is unquestionably correct.

EIGHTH EXCEPTION, pp. 23–24, Rec., is in substance, and most of it in the form in which the defendant prayed the court to instruct the jury in his second prayer, but it appearing in the first exception on p. 21 Rec., and no part of it is in conflict with the instruction asked by the defendant, and it is correct.

JURISDICTION.

THE DEFENDANT IN ERROR INSISTS THAT THIS COURT HAS NO JURISDICTION OF THIS CASE.

The judgment below was for just $5,000.

The act of Congress approved March 3, 1885, entitled:

"An act regulating appeals from the Supreme Court of the District of Columbia, and the Supreme Courts of the several territories, 23 Stats., L. 443, is as follows:

SEC. 1. That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the Supreme Court of the District of Columbia, or the Supreme Court of any of the territories of the United States unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.

SEC. 2. That the preceding section shall not apply to any case wherein is involved the *validity* of any patent or copyrights, or, in which is drawn in question the *validity* of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

It has repeatedly been held by this court that interest upon the judgment below cannot be computed in making up the amount in dispute necessary to give jurisdiction in error or upon appeal, and we supposed that it was settled beyond controversy, but we are advised by the learned counsel for the plaintiff in error that he will contend that under the recent decision in Zeckendorf *vs.* Johnson, 123 U. S., 617, the interest which accrued on the judgment in the special term between the rendition of that judgment and the judgment of affirmance in the general term may be added, thereby increasing the amount in dispute, so that will exceed $5,000, and thus give jurisdiction in error under the first section of the act referred to.

As it presents a question of much importance beyond the case at bar, before discussing Zeckendorf *vs.* Johnson, we crave the pardon of the court for presenting a brief digest of some of the decisions of the court upon this point.

The Patapsco, 12 *Wall.*, 451. On the 15th of July, 1868, the master reported the amount due $1,982. On the 11th of February, 1870, the circuit court decreed in favor of the libellant for the amount reported "*with interest from the date of the report.*" Adding the interest to the principal at the date of the decree the amount was $2,200 and upwards. The jurisdictional amount for appeal was then $2,000.

This court held that the interest should be computed on the amount found by the master up to the date of the decree. It was the precise equivalent of adding the interest up to the time of decree to the principal and making the decree for that amount, as that was the real amount then due at the date of decree; but there was no adding of interest after the decree to make up the jurisdictional amount.

New York Elevated R. R. *vs.* Fifth National Bank, 118 U. S., 608.

The plaintiff obtained a verdict for $5,000; damages on the 9th of June, 1886. A motion was made for new trial, which was denied on the 10th of August, same year, when judgment was entered for $5,068.33, being the amount of the verdict with interest up to the entry of the judgment.

On motion to dismiss in this court, it was claimed by the defendant in error that "the matter in dispute," was the amount of the verdict, and not the amount of the judgment. Said the Chief Justice on page 619:

"The value of the matter in dispute is fixed by the amount of the judgment."

On page 610:

"It is true that our jurisdiction depends on *the amount of the judgment exclusive of interest thereon.* Knapp *vs.* Banks, 2 How., 73; Western Union Telegraph Company *vs.* Rogers, 93 U. S. 565, 566; *but here the interest accrued before the judgment and not after.* In the Patapsco, 12 Wall., 451, jurisdiction was taken in a case where the decree was for $1,892 "and interest from the date of the report," which made more than $2,000 due at the time of the decree, that being then the jurisdictional limit."

In Knapp *vs.* Banks, 2 How., 73, said Mr. Justice Story:

"The amount in controversy is to be decided by the sum in controversy *at the time of the judgment, and not by any subsequeni addition thereto such as interest.*"

Said Mr. Chief Justice Waite in Western Union Telegraph Co. *vs.* Rogers, 93 U. S., at 566:

"In determining the jurisdictional amount *neither interest* on the judgment nor costs of suit can enter into the computation." Citing Knapp *vs.* Banks. *Supra.*

In Walker *vs.* United States, 4 Wall., 164.

Said Mr. Chief Justice Chase:

"In determining the jurisdictional sum or amount it is obvious that *neither interest on the judgment* nor costs of suit can enter into the computation, for costs from no part of the matter in dispute, *and interest on the judgment can only arise after rendition*, while the jurisdictional amount, if determined by the judgment, *is fixed at rendition.*

In all these cases and others which might be cited, this court has unwaveringly held that the amount in dispute was the amount fixed by the judgment at its rendition; and that it could not be enlarged by the addition of interest upon the judgment for the purpose of giving jurisdiction to this court.

Zeckerdorff *vs.* Johnson, 123 U. S., 617.

In this case a judgment was rendered in the District Court of Arizona for $4,304.93 "*with interest on* $2,800 *of that sum at the rate of* 2 *per cent. per month from the date hereof until paid, and interest on* $1,504.33 *at the rate of ten per cent. per annum from the date hereof until paid,*" from which an appeal was taken to the Supreme Court of the Territory.

This court held that the amount in dispute was the amount due at the time of the judgment of *affirmance* by the Supreme Court of the Territory, and not the amount due at the *rendition* of the judgment of the District Court and by adding the interest which had accrued between the two dates the amonnt exceeded $5,000, and the court refused the motion to dismiss.

The learned Chief Justice cited The Patapsco and N. Y. Elevated Railroad *vs.* Fifth National Bank, *supra,* as authority. In both of these cases interest was allowed to be computed, but in the latter case it was interest which had accrued upon the verdict up to the rendition of the judgment, and was incorporated into the judgment itself; and in the former the decree was for the amount found due by the Master "*with interest from the date of the report,*" and this court held that the amount in dispute was the amount found by the Master with interest up to the *rendition* of the decree. So that the interest was, in fact, incorporated into the decree.

We believe no other case is to be found in the reports of this court where interest is added to a judg-

ment or decree to determine the amount in dispute to give jurisdiction to this court.

We are at a loss how to reconcile this case with the hitherto unbroken line of decisions, unless it be the fact that the judgment is for $4,304.93, *with interest on,*" &c., makes the interest a part of the judgment, and differentiates it from a case where the judgment is simply for a certain sum of money, and the interest is a mere *incident* which the law attaches, *but it is no part of the judgment itself.* See Phillips Prac., p. 393; Bank of U. S. *vs.* Daniels, 12 Pet., 52.

We respectfully submit that a judgment of *affirmance* in the appellate court has nothing to do with determining the amount in controversy, except as it may be involved in the alleged errors presented for review by the bill of exceptions. The question is ordinarily whether the court of original jurisdiction, which rendered the judgment, committed error in receiving or rejecting evidence in its instructions to the jury.

This view is sustained by the decision in *Railroad Company vs. Trook*, 100 U. S., 112, which came up from this District. It was an action for damages against the railroad company, and the verdict was for $4,000. A motion was made for a new trial on exceptions and for excessive damages. The plaintiff below thereupon remitted $1,500, and the judgment was entered for $2,500. This judgment was afterwards affirmed on appeal by the General Term. The company then removed the case here by writ of error, and a motion was made to dismiss because the matter in dispute did not exceed $2,500.

The motion to dismiss was granted. Said Mr. Chief Justice Waite:

"Cases brought here by writ of error for the *re-examination of judgments of affirmance in the Supreme*

Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed without adding interest or costs."

If interest had been computed on the judgment of the Special Term up to the judgment of affirmance by the General Term, the amount would have exceeded $2,500, and the case would have been properly here.

But the court expressly held that in this District the amonnt of the matter in dispute "*was determined by the judgment affirmed.*"

We submit that whatever view the court may take of Zeckendorff *vs.* Johnson, The Railroad Company *vs.* Trook is conclusive of the question in this case.

THE WRIT OF ERROR WILL NOT LIE TO THIS COURT UNLESS IT INVOLVES ONE OF THE EXCEPTIONS, AUTHORIZING AN APPEAL WITHOUT REFERENCE TO THE AMOUNT IN CONTROVERSY.

These exceptions are

1. Any case wherein is involved the *validity* of any patent, or copyright.

2. Any case in which is drawn in question, the *validity* of a treaty or statute of the United States, or:

3. The *validity* of any authority exercised under the United States.

There is no suggestion of any one of these questions in the record, save in the so-called prayers of the defendant below, found in 3d, 4th, 5th, and 6th, exceptions on pp. 22, 23 and 24, Rec.

The said prayers are as follows, viz:

1. "The present government of the District of Columbia having been imposed upon the people of the District without any power or opportunity on the part

of said people to accept or reject the same; the District cannot be held responsible for the negligence of the government."

2. "The District of Columbia, under the form of government existing at the time of the accident, which is the subject-matter of this suit is not liable for damages resulting from said action."

3. "If the care of the streets of the city of Washington as a public duty is imposed by the statutes upon the District of Columbia, the performance of which is for the general benefit, and the District derives no profit from it, then no action can be maintained against the District for damages resulting from a neglect to perform such duty."

4. "The present form of government of the District of Columbia consisting as it does of officers who are all appointed and paid by the United States, without any power to levy taxes or expend money except as directed by Congress, is not of such a character as to make the District responsible in damages for any negligence of those officers."

The gist of the foregoing prayers is, that because the people living here had no power to either accept the present Government of the District of Columbia or reject; therefore, the District is not responsible for either its acts of omission or commission.

The conclusion is a *non-sequitur*; but suppose it was not, and that the court below clearly erred in refusing to instruct the jury as prayed, how would that ruling affect the *validity* of any Statute of the United States?

The court in rejecting these prayers does not undertake to pass upon the *validity* of the Government of the District of Columbia, indeed, the jury were not even told how that government was created, the prayer assumes the government to be a *valid* one, but says,

that for the reasons given, the District is not liable for damages for the negligence of the government, and is not liable for damages in this action.

The error complained of is not that the court decided the act or acts of Congress creating the District Government *invalid*, or that the question of the *validity* of said acts was in any way involved, but that the court erred in *construing* them so as to hold the District liable for damages for negligence.

The part of the 2d section of the act of March 3, 1885, under which this case is brought here viz., "or in which is drawn in question the *validity* of a treaty or a statute of, or an authority exercised under the United States," so far as it goes, is copied *verbatim* from section 709 of the Revised Statutes of the U. S., which provides for appeals from the State Court to this court. Section 709, however, adds to the words transferred to the first named act, "and the decision is against their validity." So that under this clause of section 709 if it stood alone, it would have been essential in order to bring a case from a State Court here, not only that the validity of treaty or Statute of the United States or an authority exercised under it should have been drawn in question, but that a decision adverse to the validity should have been rendered by the State Court.

But section 709 contains other provisions which it will be necessary to quote in order to a proper understanding of the argument. It further provided, "or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such validity.

Under this clause an appeal is allowed to this court where the validity of a statute of a State or an authority exercised under it, is drawn in question on the

ground that it is repugnant to the Constitution, treaties, or laws of the United States, and the State Court has decided in favor of its *validity*.

But section 709 goes still farther and provides—

"Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of or commission, held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority."

In any of these cases an appeal is allowed.

This section 709 is the 2d section of the act of February 5, 1867, to amend the judiciary act of 1789, and was held by this court in Murdoch *vs.* City of Memphis (20 Wall, 590), to supersede section 25 of that venerable act.

The change in the amended act so far as the *grounds* of appeal are concerned, are limited to the last clause quoted from section 709.

The original provision in section 25 was:

"Or where is drawn in question the *construction* of any clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute or commission "may be re-examined," &c. The original section 25 and section 2 of the Act of February 5, 1867, are placed in juxtaposition in the very elaborate and able opinion of Mr. Justice Miller in Murdock *vs.* City of Memphis (20 Wall, at 592–3)." *Supra.*

It will be seen by comparing the two acts that the scope of the original section 25 is considerably enlarged by the amended act, and this will probably account for any apparent differences which may be found

in the decisions of this court before and since the amendment relating to this subject.

A much wider range has been allowed to appeals from the State Courts since the act 1867, than before.

An appeal is authorized "where any title, right, privilege, or *immunity is claimed*, under the constitution, or any treaty or statute of or commission held or authority exercised under the United States, and the decision is adverse to the claim set up by either party."

Now let us contrast the foregoing with section 2 of the act of 1885, providing for appeals from this District, with which we are dealing.

"The appeal under this act where the amount in controversy does not exceed $5,000, is limited to—

1 A case wherein is involved the *validity* of patent or copyright.

2. Where is drawn in question the *validity* of a treaty or statute, or of an authority exercised under the United States."

No appeal is allowed under this act where there is a mere *claim* of title, right, privilege or immunity under the Constitution or any treaty, statute of, or commission held, or authority exercised under the United States; but simply and only where the *validity* of a patent or copyright is involved, or where the *validity* of a treaty, statute of or authority exercised under the United States is drawn in question.

We have taken pains to thus compare and contrast the statute authorizing appeals from the State Courts and the act authorizing appeals from the Supreme Court of the District of Columbia, because in the brief submitted by our learned friend, Mr. Totten, upon the motion to dismiss the writ of error in the case of the Baltimore & Potomac R. R. Co. *vs.* Hopkins, No. 1,173, and now before the court, and wherein is involved the construction of this District Act, we find the court is

cited to adjudications of this court under section 709, Rev. Stats., and the original section 25, judiciary act, as conclusively determining the construction of the right of appeal in this District under the act of 1885.

The learned counsel particularly citing and quoting from the opinion in Dupasseur *vs.* Rochereau. (21 Wall, 134.)

Said Mr. Justice Bradley:

"The case would be one in which a title or right is claimed *under an authority exercised* under the United States, and the decision is against the right or title set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction."

After quoting the language of Mr. Justice Bradley Mr. Totten's brief proceeds to say that "although the court sustained the jurisdiction, it held that the decision of the Court below was correct."

Of course it did, because the simple claim of right or title under an authority exercised under the United States was sufficient to give jurisdiction to this court under Sec. 709. It was not essential that the decisions below should have been wrong or that the authority should have been questioned. Indeed, the *validity* of the *authority* was assumed.

But in order to authorize an appeal under the act of 1885 the *validity* of the *authority itself* must be drawn in question, and herein is the difference between the right of appeal under this act and under that part of Sec. 709 which authorizes an appeal—

"Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty, statute, commission, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party."

And hence Dupasseur *vs.* Rochereau and all other adjudications under that part of Sec. 709 are totally inapplicable to the case at bar.

The decisions of this court upon that clause of Sec. 709, which provides as follows, viz—

"Where is drawn in question the validity of a statute or of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,—"

Are numerous and are entirely conclusive of what is meant by the term "*validity*" as used in that clause, and they all speak the same language and in our judgment are conclusive of what is meant by "*validity*" in the Act of 1885. This part of the original Sec. 25 was not changed by the act of February 5, 1867.

We beg leave to call the attention of the court to a few of them.

Commercial Bank of Cincinnati *vs.* Buckingham, 5 How., 317.

The Commercial Bank of Cincinnati was incorporated by the act of the Legislature of Ohio, passed on the 11th of February, 1829, which provided that in case the bank should at any time suspend payment and refuse to pay in gold and silver any note or bill on demand, it should be liable to pay as additional damages, to the holder of such notes, twelve per cent. per annum on the amount thereof for the time during which the payment should be refused or delayed. By a previous act of January 24, 1824, all banks had been declared liable to pay six per cent. interest on their notes when they had refused payment on demand. The only question which arose on the trial of the case was whether the bank was liable to pay the twelve per cent. in addition to the six per cent. given by the

Act of 1824, or only the twelve per cent. imposed by the act of incorporation.

Says Mr. Justice Grier: Did the decision draw in question the *validity* of these statutes on the ground of repugnancy to the Constitution of the United States, or was the Court merely called upon to decide on their *construction*?

"We are of opinion that there can be but one answer to these questions, and but few words necessary to demonstrate its correctness. Now it is conceded that the Act of 1824 is valid and constitutional whether it applies to the plaintiff's charter or not; and, if so, it follows as a necessary consequence that the question submitted to the court and decided by them was one of *construction* and not of *validity*."

The appeal was dismissed.

Referring to this case Mr. Justice Miller says, in Bridge Proprietors *vs.* Hoboken Company, 1 Wall., at 144:

"The case of the Commercial Bank *vs.* Buckingham's Executors does not conflict with this view, because that was a case in which the prior and subsequent statutes were both admitted to be valid under any construction of them, and therefore no *construction* placed by the State Court on either of them would draw in question its validity as being repugnant to the Constitution of the United States or any act of Congress."

Lawler *vs.* Walker, 14 How., 150, was brought into court by writ of error to the Supreme Court of Ohio under the 25th Section of the judiciary act upon the ground that certain statutes of the State of Ohio were repugnant to the Constitution of the United States. Says Mr. Justice Wayne on p. 155:

"Its seems to us that the statement gives its own answer, and that the Supreme Court in making its de-

cision only gave a *construction* to an Act of Ohio, which neither of itself nor by its application involved in any way a repugnancy to the Constitntion of the United States by impairing the obligation of the contract. Whether the *construction* of the act and the charter of the Canal Company was correct or not we do not say. We do not mean to discuss that point or to give any opinion upon it, but we mean to say that the *construction* does not violate a constitutional point under the 25th Section of the judiciary statute, so as to give this court jurisdiction of this cause."

Messenger *vs.* Mason (10 Wall, 507) was brought here upon a writ of error to the Supreme Court of Iowa, under the section 25, judiciary act. The certificate of the State Court was as follows:

"That on the final hearing the validity of the partition law of Iowa Territory, approved January 4, 1839, was drawn in question, on the ground that the same was in conflict with the ordinance of 1787, the Constitution of the United States, the treaties and laws thereof, that the objections thereto were overruled, and the statute held to be valid."

On motion to dismiss the writ of error, Mr. Justice Nelson referring to Maxwell *vs.* Newbold, 18 How., 511, said:

"The Chief Justice in delivering the opinion of the court observes, that "the clause in the Constitution and the laws of Congress should have been specified by the plaintiff in error in the State Court in order that this court might see what was the right claimed by them, and whether it was denied by the State Court." This court had previously ruled in Lawler *vs.* Walker *et al*, that the statement in the certificate of the State Court that there was drawn in question the validity of the statutes of Ohio, without saying what statutes, was too indefinite, and that the statutes complained of should have been specified. These decisions were reaffirmed in Hoyt *vs.* Shelden. It is quite

clear, upon these authorities that the constitutional objections taken in the present case is too general to be noticed on a writ of error under the 25th section."

The foregoing, and other cases which might be cited, show that the settled adjudication of this court is that in Section 25 of the judiciary act, and in Section 709 of the Revised Statutes, the term "*validity*," when applied to a statute or authority, does not mean the *construction* of it, where the validity is not questioned.

Applying the doctrine of these authorities to this case how can this court acquire jurisdiction?

There is not in either one of the four prayers upon which the Federal question is supposed to be based, a single sentence or word which attempts to call in ques- the *validity* of the District Government, but they simply suggest that under that government, conceded to be valid, the District should not be liable for damages for negligence in failing to keep the streets in repair.

What is that but simply a question of *construction?*

BUT THESE SO-CALLED PRAYERS DO NOT PRESENT ANY TREATY, STATUTE OR AUTHORITY EXERCISED UNDER THE UNITED STATES TO BE EVEN CONSTRUED, MUCH LESS IS THEIR VALIDITY QUESTIONED.

The nearest the 1st, 2d, and 4th prayers come to designating what is to be construed is to refer to the "present form of Government of the District of Columbia." And the 3d refers simply to the statutes without even sayiug Statutes of the United States. They don't tell the jury how the Government was created—whether by act of Congress or otherwise; or what part of the governmental organism is referred to.

Certainly, in judicial proceedings something more definite is required.

Lawler *vs.* Walker, *supra*. The Supreme Court of Ohio had certified that—

"There is drawn in question the validity of statutes of the State of Ohio, in which it is claimed by the plaintiffs in error those statutes are in violation of the Constitution of the United States and which statutes have been held valid."

Said Justice Wayne, speaking for this Court, p. 152:

"The statutes complained of in this case should have been stated. Without that the court cannot apply them to the subject-matter of litigation to determine whether or not they violated the Constitution and laws of the United States."

In Maxwell *vs.* Newbold, 18 How., 511, said Chief Justice Taney at p. 516:

"And whether a writ of error from this Court will lie or not depends upon the questions raised and decided in that Court. But neither of the questions made there by the errors assigned refer in any manner to the Constitution and laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the Act of Congress or the decisions of this court. It alleges that the charge of the court was against and in conflict with the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the State Court? Under what clause of the Constitution did he make this claim, and what right did he claim under an Act of Congress, and under what act in the wide range of our statutes did he claim it? The record does not show nor can this court undertake to determine that the question as to the faith and credit due to the record and judicial proceedings in Ohio was made or determined in the State Court, or that the court ever gave any opinion on the question. Nor for aught that appears in the record, some other clause in the Constitution or some other laws of Congress may

have been relied on, and the mind of the court never called to the clause of the Constitution now assigned as error in this court. This cannot be distinguished from the case of Lawler *vs.* Walker et al., 14 How., 149. In that case the State Court certified that there was drawn in question the validity of statutes of Ohio, &c., without saying what statutes, and in the opinion of this court, dismissing the case for want of jurisdiction, they say: 'The statutes complained of in this case should have been stated. Without that the court cannot apply them to the subject-matter of litigation to determine whether or not they violated the Constitution of the United States. So in the case before us, the clause in the Constitution and the laws of Congress should have been specified by the plaintiffs in error in the State Court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the State Court.'"

In Bridge Proprietors *vs.* Hoboken Company, 1 Wall., 143, said this Court.

"The court must be able to see clearly from the whole record that a *certain provision* of the Constitution or Act of Congress was relied on by the party who brings the writ of error, and that the right claimed was decided against him."

See also Crowell *vs.* Randall, 10 Pet., 368, where the cases are reviewed, and Detroit Railway Co. *vs.* Gulhard, 114 U. S., 133.

The record in this case shows that these prayers were presented to the court just before the case went to the jury without any explanation or premonition (and there was nothing more in fact than the record shows). How should the court know what particular features of the District Government, or what particular Acts of Congress, or what provisions of Acts of Congress were referred to from which it was to be inferred that the District was not liable for damages for

negligence? and how is this court to *guess* from the record what was intended? One thing is manifest, however, and that is the *validity* of this form of government or these Acts of Congress were not called in question—the *one fact* essential to give jurisdiction to this court.

AN AUTHORITY EXERCISED UNDER THE UNITED STATES.

The Act of March 3, 1885, authorizes a case to be brought to this court where is drawn in question the validity of an *authority exercised* under the United States.

Under this clause there must be:

1. An authority under the United States.

2. The authority must have been *exercised.*

3. The *validity* of the *authority* must be drawn in question.

The record in this case presents no such question.

Neither one of the prayers so much as hints that any authority whatever, has been *exercised.* They all present the point that the District, under its form of government, is not liable for damages for neglecting to perform duties imposed by its organic laws.

IT IS NOT PRETENDED THAT ANY AUTHORITY *was exercised.*

The whole argument of the learned counsel for the District, in his brief filed in this court, upon the motion to dismiss the writ of error upon this point, is embraced in one short paragraph, viz:

"The sole authority of the Commissioners of the District in the premises, is by virtue of certain Acts of Congress. Their appointment and commissions are from the President of the United States. All their powers are derived from Acts of Congress. *I contend that they are authorized* to take charge of,

improve and control the streets, avenues, roads and highways of the District, without liability on the part of the District, for alleged abuse, misuse, or *neglect* of such authority."

Here is no questioning of the *validity* of the authority, on the contrary, that is claimed to be conferred by *certain* acts of Congress. But he contends because the officers of the District are all appointed by the President, the District is not liable for the way in which the authority is exercised, or for failure to exercise it.

The complaint is that the Court erred in its *construction* of certain acts of Congress which are not even named either in the record or the brief of counsel.

The authority is claimed and its validity conceded, but it was not exercised. True, counsel claims that the district is not liable for damages for the *mal* exercise of this authority or the failure to exercise it; that is the construction of counsel of the law, but it in no way questions the validity of the authority. If he is dissatisfied with the construction of the organic law of the district by the courts of the district and wants the judgment of this Court upon the question, he will have to wait until he has a case where the amount in controversy is sufficiently large to give jurisdiction without resorting to the exceptions in the Act of 1885.

If appeals and writs of error from the District of Columbia were regulated by Sec. 709, Rev. Stats., which authorizes a case to be brought to this Court when any right, title, privilege, or immunity is claimed under the Constitution, or any treaty or statute or commission held, or authority exercised under the United States, and the decision is against the right, &c., and the prayers had been properly framed so as

to present the question, possibly the writ of error might lie, but it certainly will not under the Act of 1885, which governs appeals and writs of error in this District.

Millingar *vs.* Hartupee, 6 Wall., 258, was brought to this Court upon a writ of error from the Supreme Court of Virginia under Sec. 25 of the judiciary act, and was dismissed on motion for want of jurisdiction. We think it decisive of this case.

The question was whether an order of the United States District Court for the Northern District of New York releasing a lot of cotton which had been libelled as prize of war drew in question the validity of the exercise of an authority under the United States.

Said the Chief Justice:

"It is insisted on behalf of the defendant in error that the question raised and decided by the Supreme Court of Pennsylvania does not bring the case within either of the clauses of which this court has jurisdiction under the twenty-fifth section of the judiciary act, and this must be admitted unless it can be maintained that the question was upon the validity of the authority exercised under the United States and the decision was against its validity. It is clear that the case does not come under any other of the descriptions of the twenty-fifth section. It seems equally clear that the authority of the District Court to direct the release was not drawn in question. Something more than a bare assertion of such an authority seems essential to the jurisdiction of this Court. The authority intended by the act is one having a *real existence* derived from competent governmental power. If a different construction had been intended Congress would have used fitting words. The act would have given jurisdiction in case of decisions against claims of authority under the United States.

"With respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.'"

"An injunction restraining the prosecution of an action of replevin in a court established under the authority of the United States involves of itself no question of the validity of an authority exercised under the United States." *In Re* Craft, 124 U. S., 370.

So that it would not follow because the government of the District of Columbia was created by the acts of Congress that every thing that was done or not done under it necessarily drew in question the validity of an authority exercised under the United States.

THE PRAYERS PRESENTED FOR DECISION GENERAL PRINCIPLES OF MUNICIPAL LAW, BUT NO FEDERAL QUESTION.

The prayers which we have been considering invoked the decision of the court as to the liability of a municipal corporation for damages for neglecting to perform duties imposed by law upon it, and involved questions of general municipal law, and in no sense the validity of the laws of Congress or of an authority exercised under the United States.

Said the Chief Justice speaking for this Court in Tarver *vs.* Keach, 15 Wall., at 68.

"In Delmas *vs.* The Insurance Company, decided at last term, we held that when "a decision holding a contract ~~will~~ must is made by the highest court of a State, upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one we are not authorized to review."

The same principle is decided in

Delmas *vs.* The Insurance Co., 14 Wall., 661.

Bank *vs.* McVeigh, 98 U. S., 332.

In New York Life Ins. Co. *vs.* Hendrew, 92 U. S., 286.

Said Mr. Chief Justice Waite:

"The case, therefore, having been presented to the court below for decisions upon principles of general law alone, and it no where appearing that the Constitution, laws, treaties, or Executive proclamations of the United States were necessarily involved in the decision, we have no jurisdiction," citing in addition to those above,

Bethel *vs.* Demaret, 10 Wall, 537.
Rockhold *vs.* Rockhold, 92 U. S., 129.

There are now pending in this court —— cases in which the Baltimore and Potomac R. R. is plaintiff in error besides No. 193, and there may be others which have been brought up on error from this District where the sums in controversy are less than $5,000, and in some of them less than $1,000, upon the pretence that a Federal question is involved; and if the jurisdiction is maintained, the greater part of the civil cases now pending in the courts of the District may be brought here with the same propriety as those, and the overburdened docket of this Honorable Court will soon be doubled at least, by cases from this District alone; and the act of March 3, 1885, which was intended by Congress to give relief, will be the occasion of increasing a hundred fold the evil which it was inlended to remedy. Certainly the court will not open this floodgate unless compelled to do so by the plain and imperative mandate of the law.

UNDER THE LAWS GOVERNING THE DISTRICT OF COLUMBIA IS IT LIABLE FOR DAMAGES IN AN ACTION LIKE THIS?

This question has been conclusively settled by many judgments of the courts of the District, as well as by the decisions of this court.

The case of *Weightman vs. Washington*, 1 *Black*, 45, decided that the City of Washington was liable to a party injured by reason of a defect in a bridge, which the charter required the city to keep in repair.

From that time until the case of *Barnes vs. The District of Columbia*, 91 *U. S.*, 540, the liability of the city for damages in similar cases was not questioned.

The form of the government having been changed by the Act of February 21, 1871, from that by a city charter, to a sort of territorial form, with a governor, council, house of delegates and board of public works, which last was charged with keeping the streets in repair. This board was appointed by the President as well as all the other officers, except the members of the house of delegates who were elected by the people.

Barnes brought suit against the District, to recover damages for injuries received by him in consequence of the street being out of repair.

The District denied its liability for negligence of the Board of Public Works, because it was an independent body appointed by the President, and over which the District Government had no control, etc. The court below so held, but this court reversed the judgment. The decision was by a divided court it is true, but it was none the less authoritative on that account.

In the opinion of Mr. Justice Hunt, the whole subject of municipal liability is fully and ably discussed, and the doctrine of the Weightman case was affirmed and applied to the changed form of the District Government.

That decision has ever since it was rendered been acquiesced in as setting the question of the liability of the District under the municipal government of 1871.

Johnston vs. District of Columbia, 118 *U. S.*, 19, was an action against the District by a tax payer of Washington, to recover damages for injury to his property by the overflow of a sewer, because it was inadequate in a freshet to carry off the water.

The court below held that the District was not liable. The case was brought here, and Mr Justice Gray in

delivering the opinion of this court affirming the judgment below, thus refers on p. 21 to the cases of *Barnes and Weightman, supra.*

"The question in judgment, in Barnes *vs.* District of Columbia, and Weightman *vs.* Washington, 1 Black., 45, was of municipal liability, not for injury to property by a sewer, but for a personal injury to a traveller by want of repair in a highway, a question not now before us."

The binding authority of these cases is not questioned but tecitly recognized.

Coughlin vs. District of Columbia, 106 *U. S.*, 7, was an action to recover damages for a personal injury sustained by reason of a defect in the highway. It had been decided in the court below against the plaintiff and came with the Barnes case to this court, and following and depending on the Barnes case, the judgment was reversed, and the case was sent back for retrial, and had again came back upon questions which arose in the court below, upon the seeond trial.

Said Mr. Justice Gray speaking for this court.

"The Supreme Court of the District of Columbia originally held that the action could not be maintained against the defendant, and gave judgment in its favor. But this court on writ of error reversed the judgment and ordered a new trial. Dant *vs.* District of Columbia, 91 U. S., 557; upon the present record that decision of this court must, as assumed by both counsel at the argument be considered as setling the law of the case on the question then decided."

The law that was settled in the Dant case was that the District was liable in precisely such a case as this.

Since the Barnes case, quite a number of similar suits have been brought and tried, and judgment rendered against the District. The courts of the District

have uniformly held that the question of liability on the part of the District was not an open question, and have not even been willing to hear argument upon it as in this case and in the case of Emerson, which succeeds the counsel for the District, simply presented and read his prayers saying to the court, that he didn't expect them to be allowed and presented them simply to save the question.

The only possible excuse for bringing this question here again at this late day, when everybody has regarded it as finally settled, is the fact that since the Barnes case, another change has been made in the form of the District Government. And we now have triumvirs instead of a governor, council, house of delegates, and board of public works.

But the same general municipal powers are conferred, the same duties imposed, and the same liabilities incurred as under the charter of the City of Washington, and the territorial form of government; and each is but a municipality designed to accomplish local government for municipal purposes.

The present government was created by Act of Congress, of June 11th, 1878, 20 Stats., L., 102.

Sec. 1 provides:

"That all the territory which was ceded by the State of Maryland to the Congress of the United States, for the permanent seat of government of the United States shall continue to be designated as the District of Columbia.

Said District and the persons and property that may be therein, shall be subject to the following provisions for the government of the same, and also to any existing laws applicable thereto and not hereby repealed or inconsistent with the provisions of this Act.

The District of Columbia *shall remain and continue à municipal corporation* as provided in section 2 of the revised Statutes, relating to the District of Colum-

bia, and the *commissioners therein provided for shall be deemed and taken as officers of such corporation*, and all laws in force relating to the District of Columbia, not inconsistent with the provisions of this act shall remain in full force and effect."

Sec. 3 provides that:

"All powers, rights, duties, privileges, lawfully exercised by, and all property, estate, and effects now vested by law in the commissioners appointed under the "Act of June 20, 1874, shall vest in the commissioners provided for by this act."

Sec. 2 of the Rev. Stats. of the District referred to above, is as follows:

"The District is created a government by the name of the District of Columbia, by which name it is created a body *corporate for municipal purposes*, and may contract, and be contracted with, sue and be sued, plead and be impleaded, have a seal, and exercise all other *powers of a municipal corporation*, not inconsistent with the Constitution and laws of the United States, and the provisions of this title."

There are some differences in the plan and details of the present form of municipal government, from that of February 21, 1871, but there are no such differences as in any way effect the liability of the District for damages in this case.

Under all the mutations through which the government of the City of Washington and the District of Columbia have gone, it has been all the time and is still declared by Congress to be a *municipal corporation*, with all the powers of such corporations not inconsistent with the Constitution and laws of the United States, and it follows that it is charged with the responsibilities and liabilities of such corporations To say that a corporation clothed with all these powers shall not be responsible for the proper exercise of them would be a monstrous absurdity.

The question raised by the plaintiff in error is its prayers below, and the brief in this court were all made in the Weightman & Barnes cases, and especially the latter, and were decided adversely to the District, and these decisions are quite as applicable to the present municipality as to its predecessors.

This court has uniformly held that a municipal corporation charged by law with the duty of keeping its streets in repair, is liable to an action for injuries received by an individual in consequence of the unsafe condition of the streets.

City of Chicago *vs.* Robbins, 2 Black., 418.
Nebraska city *vs.* Campbell, Id., 590.
Mayor *vs.* Sheffield, 4 Wall., 189.
Robbins *vs.* Chicago, 4 Wall., 157.

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